No. 82-1500

In The
Supreme Court of the United States

APRIL TERM, 1983

BERNARD P. COLOKATHIS,
Petitioner,

v.

WENTWORTH-DOUGLASS HOSPITAL,
JOHN L. BECKWITH, WILLIAM CUSECK, JR.,
ROGER C. TEMPLE, H. JACK MYERS, AND JOHN NEFF,
Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTIONS PRESENTED

1. Whether this Court should review the district court's decision to dismiss petitioner's case for want of prosecution, where the court of appeals affirmed the district court's exercise of discretion as in conformance with well-settled law, where the case involves no issues of "public significance" or a conflict of opinions among the circuit courts of appeal.

2. Whether this Court should have accepted the Petition for filing, despite its untimeliness, in light of petitioner's failure to timely file a petition for rehearing in the first circuit and his previous delays in this case.

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REASONS FOR DENYING THE WRIT

A. THIS CASE IS NOT APPROPRIATE FOR REVIEW BECAUSE PETITIONER ONLY SEEKS TO VINDICATE HIS RIGHT TO PROCEED WITH LITIGATION BY OBTAINING ANOTHER REVIEW OF THE CIRCUMSTANCES SURROUNDING THE DISMISSAL FOR WANT OF PROSECUTION.

This case does not present the Court with either an issue involving "immediate public significance" or an issue involving "a real and embarrassing conflict of opinion and authority between the circuit courts of appeals". *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1954), *citing Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Rather, it involves a question of importance only to the petitioner; whether the district court abused its discretion in dismissing his federal complaint for want of prosecution. This question, in turn, requires a review of the circumstances of the case in conformance with well-settled law not in dispute among the circuits, including the power of district courts to dismiss a case for want of prosecution, in the first instance, and the appropriate standard of appellate review. Accordingly, this Court should not grant petitioner another factual review of the circumstances surrounding the dismissal of his federal litigation merely to satisfy petitioner's redundant efforts to vindicate a purely private right.

In fact, the first circuit has already performed this review. (*See* decision reproduced herein as Appendix A) In a unanimous decision the first circuit affirmed the dismissal of the district court. The first circuit noted that:

> "This was an appropriate case for dismissal. The court had endured four and a half years of delay and confusion, contributed to by at least seven different attorneys for the plaintiff. It had repeatedly warned that no further delay would be countenanced. In light of the prior requests for continuances to give new counsel the opportunity to famil-

> iarize themselves with the voluminous record and the fact that local counsel, prior to the withdrawal of attorney Hirsch, apparently had little involvement in the conduct of trial preparation, the district court was warranted in concluding that the most recent changing of the guard could only signal further delay. We see no reason why the court and the defendants should have been put to the further trial preparation expense that would have been required had the court waited to dismiss the case when the plaintiff actually requested further delay". (Appendix A at 5a)

The first circuit's decision clearly indicates that petitioner has already been fairly afforded a review of the district court's dismissal, consistent with well-settled law as discussed below.

1. *The power of the district court to invoke the sanction of dismissal for want of prosecution without advance notice and hearing is well-settled.*

Importantly, the first circuit's decision does not raise any unresolved questions about the inherent power of a district court to dismiss a case, *sua sponte,* without advance notice and hearing. In fact, this Court resolved those issues over twenty years ago in *Link v. Wabash Railroad Co.,* 370 U.S. 626 (1962). In *Link,* this Court succinctly stated:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of nonsuit and non prosequitur entered at common law...." *Id.* at 629-30.

Moreover, the Court concluded in this decision that a district court may dismiss a case, *sua sponte,* without advance notice and hearing, and reaffirmed the rule that a party is deemed bound by the acts of his lawyer-agent. 370 U.S. 630-34. Therefore, the Court has already settled, and conversely this

case does not raise, any significant legal questions regarding the district court's use of the sanction.

2. *The courts of appeal uniformly hold that a district courts exercise of this power is discretionary and should be sustained on appeal in the absence of abuse.*

Contrary to petitioner's assertions, the decision of the first circuit does not result in conflict of opinion between the circuit courts of appeal regarding the standard of appellate review. (Petition at 30) Indeed, all eleven circuits apply an abuse of discretion standard with common criteria for judging whether the discretion of the district court has been soundly exercised.[1] In applying the standard, the starting point in making a determination in every circuit is a careful review of the circumstances of the case. Because circumstances differ in every case, the circuits have uniformly held that the proper sanction cannot be automatically or mechanically applied.[2]

Notwithstanding the lack of precise rules as to what circumstances merit a particular sanction, the circuits have upheld involuntary dismissal in similar cases. Specifically, appellate courts frequently have affirmed dismissal in cases

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[1] *See e.g., Corchado* v. *Puerto Rico Marine Management, Inc.*, 665 F.2d 410 (1st Cir. 1981); *Saylor* v. *Bastedo*, 623 F.2d 230 (2nd Cir. 1980); *Dyotherm Corp.* v. *Turbo Machine Co.*, 392 F.2d 146 (3rd Cir. 1968); *Reizakis* v. *Loy*, 490 F.2d 1132 (4th Cir. 1974); *Martin-Trigona* v. *Morris*, 627 F.2d 680 (5th Cir. 1980); *Holt* v. *Pitts*, 619 F.2d 558 (6th Cir. 1980); *Beshear* v. Weinzapfel, 474 F.2d 127 (7th Cir. 1973); *Moore* v. *St. Louis Music Supply Co.*, 539 F.2d 1191 (8th Cir. 1976); *Chism* v. *Nat. Heritage Life Ins. Co.*, 637 F.2d 1328 (9th Cir. 1981); *Davis* v. *Operation Amigo, Inc.*, 378 F.2d 101 (10th Cir. 1967); *Arundar* v. *Staff Builders Temporary Personnel, Inc.*, 92 FRD 770 (N.D. Ga. 1982); *see also, 5 Moore's Federal Practice*, §41.11[2] at 41-125 (2nd Ed. 1982).

[2] *See e.g; Reizakis* v. *Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974).

Although the petitioner would have this Court set "definite guidelines . . . to determine the proper sanction to be imposed by the trial courts" (Petition at 30), the circuits have long recognized that an appropriate sanction varies from case to case and depends greatly on the conduct of the litigants. *See e.g., Chism, supra* at 1331.

where plaintiffs have failed to comply with pretrial orders,[3] to proceed with discovery or to attend hearings or scheduled conferences,[4] and where plaintiffs have deliberately proceeded in a dilatory fashion.[5] Importantly, decisions from the first circuit regarding dismissal for want of prosecution have been in line with the decisions of the other circuits[6] as well as with this court's decision in *Link*.[7]

3. *The first circuit properly concluded that the dismissal was within the permissible range of the district court's discretion.*

Finally, even a cursory review of the first circuit's decision indicates that the court rejected every contention petitioner now raises before this court. After carefully reviewing the record, the first circuit concluded that petitioner was personally responsible for unwarranted delays, waste of judicial resources, and unwarranted cost to the defendants. (Appendix A at 5a) Moreover, the court concluded that a lesser sanction would not have "served to prevent the further delay and harassment of the court and the defendants that the court's order sought to avoid." (Appendix A at 5a)

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[3] *See e.g., Chira* v. *Lockheed Aircraft Corp.*, 634 F.2d 664 (2nd Cir. 1980); *Hepperle* v. *Johnston*, 590 F.2d 609 (5th Cir. 1979); *von Poppenheim* v. *Portland Boxing Comm'n*, 442 F.2d 1047 (9th Cir. 1971).

[4] *See e.g., Chism* v. *National Heritage Life Ins. Co.*, 637 F.2d 1328 (9th Cir. 1981); *Harrelson* v. *U.S.*, 613 F.2d 114 (5th Cir. 1980); *Anthony* v. *Marion Co. Hosp.*, 617 F.2d 1164 (5th Cir. 1980).

[5] *See e.g., Martin-Trigona* v. *Morris*, 627 F.2d 680 (5th Cir. 1980); *Davis* v. *Williams*, 588 F.2d 69 (4th Cir. 1978).

[6] For instance, in *Pease* v. *Peters*, 550 F.2d 698 (1st Cir. 1977), the first circuit set out four basic principles involving dismissal for want of prosecution, including: 1) dismissal *sua sponte* is within the inherent power of the court; 2) the exercise of this power is discretionary and should be sustained on appeal in the absence of abuse; 3) dismissal is a harsh remedy and should be used only in extreme cases; and 4) the power of the court to prevent undue delay must be weighed against the policy favoring disposition of cases on their merits. See also, *Corchado* v. *Puerto Rico Marine Mgmt., Inc*, 665 F.2d 410, 413 (1st Cir. 1981).

[7] *See e.g., Pease, supra; Forteza e Hijos, Inc.* v. *Mills*, 534 F.2d 415, 418 (1st Cir. 1976).

As the record amply demonstrates, dismissal without notice did not impose an unjust penalty on the petitioner. On this point, the first circuit determined:

> "In light of the fact that plaintiff's problems are apparently due largely to his own inability to get along with his counsel, with the result that after four and a half years the case was still not prepared for trial, and of the court's repeated warning that further delay would result in dismissal of the case, we cannot say that there was any unfairness to the plaintiff in the fact that he was not afforded one final opportunity to try to persuade the court that the history of delays would not be repeated." (Appendix A at 6a)

Accordingly, the first circuit properly affirmed the district court's dismissal of petitioner's case for want of prosecution.

B. THIS CASE WAS NOT FILED IN TIME AND THE COURT SHOULD NOT GRANT AN EXCEPTION IN LIGHT OF PETITIONER'S FAILURE TO TIMELY FILE A PETITION FOR REHEARING IN THE FIRST CIRCUIT AND HIS PREVIOUS DELAYS IN THIS CASE.

Despite the clear requirements of Supreme Court Rule 20 and 28 U.S.C. §2101(c), petitioner failed to file his Petition for Writ of Certiorari within ninety (90) days of the first circuit's decision. Apparently the petitioner, on the advice of counsel, thought he had ninety (90) days from the date of the court's order denying his Motion For Extension of Time for Which to File Petition for Rehearing. (See Petitioner's Motion to Extend Time for Entry of Petition for Certiorari at 3) While this may be an acceptable excuse in some cases, it should not be here in light of previous delays and confusion caused by petitioner.

In large measure, petitioner's failure to file a Petition on time resulted from the late filing of a petition for rehearing in the first circuit. The record clearly demonstrates that petitioner filed the rehearing request after the mandate had issued.

(Appendix B) Although petitioner then moved for an extension of time, the first circuit denied the motion and never reached the merits of the rehearing request. (Appendix C)

The petitioner's inability to make application for a Writ of Certiorari within the time period allotted illustrates his conduct on procedural matters throughout this case. In addition to missing the filing deadlines for the Petition for Writ of Certiorari and for the petition for rehearing, petitioner had previously missed discovery deadlines and a discovery hearing. (Appendix A at 3a) As he has in the past, petitioner attempts to shift the blame for these procedural problems to his counsel. The first circuit, however, rejected this contention on the ground that "plaintiff's problems are apparently due largely to his own inability to get along with his counsel". (Appendix A at 6a)

As a result of this pattern of delay, confusion and excuses, the petitioner has put defendants to additional expense and has wasted even more judicial time. These very reasons prompted the district court to dismiss this case on April 6, 1982. Approximately one year later, and almost five years from the filing of the complaint, respondents confront another review in yet another forum. While respondents do not deny petitioner's right to exhaust his rights of appeal according to the rules of procedure, the rules under these circumstances should be fairly applied to deny review.

C. CONCLUSION

For the reasons stated, the respondents, Wentworth-Douglass Hospital, John L. Beckwith, William Cuseck, Jr., Roger C. Temple, H. Jack Myers, and John Neff, respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Of Counsel:
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UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82-1410

BERNARD P. COLOKATHIS,
Plaintiff, Appellant,

v.

WENTWORTH-DOUGLASS HOSPITAL, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Martin F. Loughlin, *U.S. District Judge*]

Before

Coffin, *Chief Judge,*

Timbers,* *Senior Circuit Judge,*

and Breyer, *Circuit Judge.*

Charles A. Meade, with whom *Stephen R. Fine & Associates, P.A.* was on brief, for appellant.
Robert M. Larsen, with whom *Eugene Van Loan, III, A. J. McDonough,*
and *Sulloway, Hollis & Soden* were on brief, for appellees.

November 15, 1982

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* Of the Second Circuit, sitting by designation.

COFFIN, *Chief Judge.* Bernard Colokathis appeals from an order of the District Court of New Hampshire dismissing his complaint for want of prosecution. After hearing oral argument from the parties and carefully reviewing the record, we conclude that the district court was within the proper exercise of its discretion in dismissing the case.

The case has a long history. We rehearse here only the highlights. Plaintiff filed his complaint in November of 1977. Extensive discovery was conducted by plaintiff's first trial counsel and a trial date was set for June 9, 1980. On May 6, 1980, the case was continued on the court's own motion and the trial date was changed to December 29, 1980. On September 24, 1980, plaintiff's counsel withdrew, citing serious and irreconcilable differences with the plaintiff. There followed a parade of new counsel for the plaintiff, totalling at least seven by May of 1982.[1] One of the new counsel, David DePuy, entered on December 10, 1980. Because he "had not had an opportunity to review all of the pleadings and discovery compiled to date", he asked for and was granted a continuance in the trial from the scheduled December 29, 1980 date to December 7, 1981.

On January 15, 1981, another new counsel, Leo Hirsch, appeared on behalf of plaintiff. He advised the court that he expected to be able to review the file of approximately 4,000 to 5,000 pages within six weeks of receiving it. The court gave him until March 16, 1981 to notify the court and parties what further discovery would be necessary to prepare the plaintiff's case for trial. On March 11, 1981, the plaintiff reported to the court that it was "impossible to complete the review of the file in a thorough manner so as to be able to decide what additional discovery might be required by March 16, 1981." The court

[1] There is some confusion as to the exact number of attorneys. Plaintiff counts ten, five local counsel and five out of state trial counsel, but his count includes two attorneys who may never have formally appeared in the action. In any case, seven are enough.

granted an extension to July 31, 1981. On May 22, 1981, attorney Hirsch outlined his requested discovery and defendants objected. On June 11, 1981, the court announced that the case would take priority on his calendar and that "[n]o further continuance will be granted." At a hearing on September 11, 1981, the trial judge expressed his concern over "the lack of any discovery since my Order of January 20, 1981, and the close proximity of final pretrial on November 20, 1981 and trial date of December 7, 1981" and ordered a September 11, 1981 cutoff for plaintiff's additional discovery requests and an October 8, 1981 hearing on discovery objections.

On September 16, 1981, plaintiff's local counsel withdrew. Plaintiff failed to appear at the discovery hearing, held on October 9, and the court denied the discovery requests. On October 21, 1981, attorney Hirsch moved to have the October 9 orders withdrawn, arguing that they amounted to a denial of due process.

On October 28, 1981, new local counsel appeared and moved to continue, arguing that attorney Hirsch had not received notice of the October 9 hearing and that "at the very best the discovery conducted by plaintiff's previous trial counsel was inadequate." On November 13, 1981, the trial judge denied the motion to withdraw the October 9 orders, denied all further discovery and all further continuances, "absent the most exigent of circumstances", and ordered that "this case will proceed to trial as presently scheduled, or it will be dismissed with prejudice." Because of the trial judge's illness, the trial date was changed again, to April 27, 1982. The final pretrial conference was scheduled for April 8, 1982.

On April 2, 1982, attorney Hirsch withdrew, citing "irreconcilable differences" with the plaintiff over the payment of legal fees and the conduct of the case. On April 6, 1982, the court dismissed the case. The court noted the dilatory tactics of the plaintiff, the cost to the defendants, the waste of judicial resources and the probability of further delay. Plaintiff's local

counsel moved to reinstate the case, assuring the court that he was ready, willing and able to proceed with the case as scheduled. The court denied the motion.

On appeal, plaintiff argues that the court abused its discretion by not considering less drastic sanctions than dismissal and by not waiting until the date set for trial to determine whether the latest change in counsel would result in further delay of the case. He also asserts that he should have had notice and a hearing prior to the dismissal of his case or at least an opportunity to explain to the court the reasons for the actions that provoked dismissal. We disagree.

We have had several occasions recently to rehearse the standards for dismissal, under Fed. R. Civ. P. 41(b), for want of prosecution. As we noted in *Medeiros* v. *United States*, 621 F.2d 468, 470 (1st Cir. 1980) (*quoting Zavala Santiago* v. *Gonzalez Rivera*, 553 F.2d 710, 712 (1st Cir. 1977)):

> "A district court unquestionably has the authority to dismiss a case with prejudice for want of prosecution; this power is necessary to prevent undue delays in the disposition of pending cases, docket congestion, and the possibility of harassment of a defendant. *See Link* v. *Wabash R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); 9 Wright & Miller, Federal Practice and Procedure §2370 at 199. Because of the strong policy favoring the disposition of cases on the merits, *see Richman* v. *General Motors Corp.*, 437 F.2d 196, 199 (1st Cir. 1971), we, and federal courts generally, have frequently warned that dismissals for want of prosecution are drastic sanctions, which should be employed only when the district court, in the careful exercise of its discretion, determines that none of the lesser sanctions available to it would truly be appropriate. *See Asociacion de Empleados* v. *Rodriguez Morales*, 538 F.2d 915 (1st Cir. 1976); *Richman* v. *General Motors Corp., supra. See also Durgin* v. *Graham*, 372 F.2d 130, 131 (5th Cir. 1972). But we have not hesitated to affirm dismissals of suits for want of prosecution in the appropriate cases. *See Pease* v. *Peters*, 550 F.2d 698 (1st

Cir. 1977); *Asociacion de Empleados* v. *Morales, supra; cf. Luis Forteza e Hijos, Inc.* v. *Mills*, 534 F.2d 415 (1st Cir. 1976)."

This was an appropriate case for dismissal. The court had endured four and a half years of delay and confusion, contributed to by at least seven different attorneys for the plaintiff. It had repeatedly warned that no further delay would be countenanced. In light of the prior requests for continuances to give new counsel the opportunity to familiarize themselves with the voluminous record and the fact that local counsel, prior to the withdrawal of attorney Hirsch, apparently had little involvement in the conduct of trial preparation, the district court was warranted in concluding that the most recent changing of the guard could only signal further delay. We see no reason why the court and the defendants should have been put to the further trial preparation expense that would have been required had the court waited to dismiss the case when the plaintiff actually requested further delay.

As plaintiff points out, we have counseled in other cases that the court should consider less drastic sanctions than dismissal. *See Zavala Santiago* v. *Gonzalez Rivera*, 553 F.2d 710, 712 (1st Cir. 1977) (suggesting sanctions such as a warning, a formal reprimand, placing the case at the bottom of the calendar list, a fine, the imposition of costs or attorney fees, and the temporary suspension of the counsel from practice). Here we see no less drastic sanction that would have served to prevent the further delay and harassment of the court and the defendants that the court's order sought to avoid.

Nor are we persuaded that the plaintiff was entitled to notice and a hearing before the court dismissed the case. The Supreme Court has made clear that "when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting." *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 633

(1962). *See also Corchado* v. *Puerto Rico Marine Management, Inc.*, 665 F.2d 410 (1st Cir. 1981).

In light of the fact that plaintiff's problems are apparently due largely to his own inability to get along with his counsel, with the result that after four and a half years the case was still not prepared for trial, and of the court's repeated warning that further delay would result in dismissal of the case, we cannot say that there was any unfairness to the plaintiff in the fact that he was not afforded one final opportunity to try to persuade the court that the history of delays would not be repeated.

The judgment of the district court is affirmed.

Adm. Office, U.S. Courts—Addison C. Getchell & Son, Inc.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82-1410

BERNARD P. COLOKATHIS
Plaintiff/Appellant

v.

WENTWORTH-DOUGLASS HOSPITAL, ET AL
Defendants, Appellees

MOTION FOR EXTENSION OF TIME FOR WHICH TO FILE PETITION FOR REHEARING

NOW COMES Bernard P. Colokathis and moves that the time in which to file a Petition for Rehearing, filed herewith, be extended to December 10, 1982.

Respectfully submitted,
Bernard P. Colokathis,
By his Attorneys,
STEPHEN R. FINE & ASSOC., PA

December 7, 1982 By _____

Charles A. Meade
99 Middle Street
Manchester, N.H. 03101

I certify that a copy of the foregoing Motion was mailed this day to Robert M. Larsen, opposing counsel at Sulloway, Hollis & Soden, Concord, N.H..

_____

Charles A. Meade

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82-1410.

BERNARD P. COLOKATHIS,
Plaintiff, Appellant,

v.

WENTWORTH-DOUGLASS HOSPITAL, ET AL.,
Defendants, Appellees.

ORDER OF COURT

Entered December 10, 1982

Upon consideration of appellant's motion for extension of time within which to file petition for rehearing which motion was received after mandate had issued under the Rules,

It is ordered that said motion for enlargement of time is denied and the Clerk is directed to return the tendered petition to counsel.

By the Court:

/s/ DANA H. GALLUP

Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1410

BERNARD P. COLOKATHIS
Plaintiff, Appellant

v.

WENTWORTH-DOUGLASS HOSPITAL,
JOHN L. BECKWITH, WILLIAM CUSECK, JR.,
ROGER C. TEMPLE, H. JACK MYERS, AND JOHN NEFF
Defendants, Appellees

APPEAL FROM ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW HAMPSHIRE

BRIEF FOR DEFENDANTS

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TABLE OF CASES

STATEMENT OF ISSUES

1. DID THE DISTRICT COURT PROPERLY EXERCISE ITS DISCRETION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO PROSECUTE WHERE THE RECORD DEMONSTRATED REPEATED DILATORY CONDUCT BY THE PLAINTIFF?

2. DID THE DISTRICT COURT PROPERLY ORDER DISMISSAL WITHOUT HEARING, WHERE THE PLAINTIFF HAD FULL AND PRIOR NOTICE OF THE CONSEQUENCES OF FURTHER DILATORY CONDUCT?

3. DID THE DISTRICT COURT PROPERLY HOLD PLAINTIFF RESPONSIBLE FOR THE REPEATED DELAYS CAUSED BY THE SUCCESSIVE WITHDRAWALS AND CONDUCT OF HIS MANY ATTORNEYS?

STATEMENT OF THE CASE

This is an appeal from an order of the District Court of New Hampshire (Loughlin, J.) dismissing plaintiff's complaint for want of prosecution.

In November, 1977, the plaintiff, a general surgeon, filed a complaint alleging, among other things, that he was denied due process of law by defendants Hospital and physicians. Over the following eighteen months discovery was aggressively undertaken by plaintiff's first trial counsel, Victor Glasberg ("Glasberg"). Plaintiff's discovery included multiple requests for documents, multiple interrogatories to various defendants as well as depositions, along with repeated hearings in response to motions to compel and for orders regulating the sequence and timing of discovery, and for costs.

At the time of Judge Loughlin's first contact with the case in May of 1979, he warned that:

> "It is evident from the voluminous files and judge time so far necessitated in this case that counsel are being obdurate and making or attempting to make a travesty of the discovery process. Counsel are hereby notified that this case will be closely monitored by this Judge as it has been assigned to him. Therefore, the following orders will be strictly adhered to under the threat of sanctions." (Appendix at 379)

Thereafter, under the watchful eye of the Court, plaintiff continued extensive discovery. (Index to Appendix, 57 et *seq.*) As discovery progressed, the Court scheduled a final pretrial conference for May 20 and a trial date of June 9, 1980. ("first trial date"). The case was continued on the Court's own motion on May 6, 1980 and was subsequently rescheduled for trial on December 29, 1980 ("second trial date"). (Appendix at 437)

On September 24, 1980, Glasberg withdrew. He asserted in his Motion to Withdraw that serious and irreconcilable

differences had made further representation impossible. (Appendix at 444) Glasberg further stated that he had advised plaintiff approximately five months earlier that he would withdraw unless their differences were resolved. (Appendix at 444) Glasberg and local counsel, Arpiar Saunders, fiied an attorney's lien on December 8, 1980. (Appendix at 451)

On October 23, 1980 Alfred Catalfo, Jr. (Catalfo) filed an appearance as counsel for the plaintiff. (Appendix at 448) Catalfo also moved Pro Haec Vice for Attorney Charles Philamore Bailey (Bailey) of New York.[1] (Appendix at 449) Catalfo then withdrew as counsel on November 14, 1980. (Appendix at 450) On December 10, 1980, R. David DePuy (DePuy) entered an appearance as counsel for plaintiff. (Appendix at 453) DePuy moved Pro Haec Vice on Behalf of Kurt J. Wolff (Wolff) in the firm of Otterbourg, Steindler, Houston and Rosen of New York, New York. (Appendix at 454)

Predictably, DePuy also moved to continue both the pretrial conference and the trial date. (Appendix at 455) This was five days before the scheduled final pretrial conference and a little more than two weeks before the second trial date.

On December 19, 1980 the Court rescheduled the trial date for December 7, 1981 ("third trial date"). (Appendix at 457) In January, 1981, Leo N. Hirsch (Hirsch) appeared on behalf of plaintiff as trial counsel along with Wolff. (Appendix at 462-63)

On January 15, 1981, a pretrial conference was held at which Hirsch first participated on behalf of plaintiff. (Appendix at 459; 460) Hirsch advised the Court that Attorney Glasberg's file was approximately 4,000 to 5,000 pages in length, that he would be able to review the file within six weeks

[1] Bailey never filed a formal appearance in this action and never signed any of the plaintiff's pleadings, as indicated by the Appendix. Bailey may not have formally withdrawn, as plaintiff notes, but defendants doubt seriously that he was ever in a position to try the case.

of receipt of the file (or by March 16, 1981), and that he did not anticipate any problems with the representation of plaintiff through the trial of the case. (Appendix at 460) However, on March 11, 1981, DePuy moved for an extension of the deadline. (Appendix at 464) By order of March 24, 1981, the Court extended the time for Hirsch to review the file and required him to advise the Court of further discovery by May 31, 1981. On June 11, 1981, the Court informed all counsel that this case was to be given priority and that the Court would not grant further continuances. (Appendix at 465)

Hirsch and Bailey were formally substituted as attorneys of record for Wolff on July 14, 1981. (Appendix at 467) Wolff then withdrew on July 20, 1981. (Appendix at 469) On May 22, 1981, Hirsch outlined the discovery he desired to pursue prior to the December 7 trial date. Defendants objected and the Court scheduled a further pretrial conference for August 13, 1981. At the request of all parties, the pretrial conference was continued to September 10, 1981.

The further pretrial conference was held on September 10, 1981. (Appendix at 473) At that time, the Court was clearly unhappy with the lack of any discovery activity by plaintiff subsequent to the Court's Order of January 20, 1981 as well as with the sudden push for discovery in such close proximity to the final pretrial conference scheduled for November 20, 1981 and the third trial date. (Appendix at 475) In his Order of September 11, 1981, Judge Loughlin ordered strict compliance with the Federal Rules of Civil Procedure, and a September 17 cut-off for request for additional discovery. He also scheduled a hearing on discovery objections, if any, for October 8, 1981. (Appendix at 473)

DePuy withdrew on September 16, 1981 leaving the plaintiff without local counsel in violation of Local Rule 5b. (Appendix at 476) On September 23, plaintiff gave notice of further depositions of defendants. (Appendix at 12, Docket

Entry 270) Because the defendants had previously been deposed extensively, the defendants objected. Despite adequate notice of the date of the hearing on defendants' objections, counsel for the plaintiff failed to appear at the rescheduled hearing on October 9, 1981. In response, the Court denied the discovery requests, required local counsel to appear on behalf of the plaintiff, and chided plaintiff once again for his dilatory actions. (Appendix at 12, Docket Entries 276, 277)

On October 28, 1981, Charles Meade (Meade) appeared as local counsel. On November 9, 1981, Meade moved to continue claiming that discovery by Glasberg had been inadequate, and that "trial counsel" needed additional time to prepare and take depositions. By Order dated November 13, 1981 the Court gave notice in no uncertain terms to plaintiff that this case was to proceed as scheduled, "absent the most of exigent circumstances", or it would be dismissed with prejudice. (Appendix at 502)

Shortly thereafter, Judge Loughlin suffered a stroke that required, once again, postponement of the final pretrial conference and the third trial date. The final pretrial conference was subsequently rescheduled for April 8, 1982, with trial to commence on April 27, 1982 ("fourth trial date"). (Appendix at 545)

Then, on April 2, 1982, less than four weeks prior to the fourth trial date and less than a week before the scheduled final pretrial conference, Hirsch withdrew without any prior warning. Hirsch's Motion for Leave to Withdraw blamed the plaintiff for his withdrawal on the eve of trial. According to Hirsch, the plaintiff had refused on April 1, 1982 to pay further legal fees until trial, and had not cooperated in the preparation of the case. (Appendix at 546)

In response to this development, on April 6, 1982, the Court dismissed the case. (Appendix at 552) As grounds for dismissal, the Court noted the dilatory tactics of the plaintiff

(Appendix at 552), the cost of legal expenses to the defendants (Appendix at 553; 536), the age of the action (Appendix at 552), the tremendous amount of judicial time expended in managing the case (Appendix at 554), and the probability of further delay. (Appendix at 554)

Judgment was entered on April 6, 1982. (Appendix at 555) Plaintiff's Motion to Vacate Order of Dismissal and to reinstate the trial was denied on April 14, 1982 and plaintiff subsequently brought this appeal.

SUMMARY OF ARGUMENT

It is defendants' position that the District Court properly dismissed plaintiff's complaint for want of prosecution. The Court's exercise of discretion is supported by the repeated dilatory conduct by plaintiff and the prejudice to defendants. Plaintiff cannot seriously contend that he did not have warning of this sanction. The District Court monitored this case closely and warned plaintiff again on November 13, 1981 that any more delays would result in dismissal. However, plaintiff once again became involved in a fee dispute, and failed to cooperate in the preparation for trial. The Court properly concluded that plaintiff's personal lack of cooperation with trial counsel, and consequently counsel's inability to prepare for the fourth trial date, was inexcusable in light of previous delays and justified dismissal without notice or hearing.

ARGUMENT

I. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO PROSECUTE IN RESPONSE TO REPEATED DILATORY CONDUCT BY THE PLAINTIFF.

The District Court's authority to dismiss plaintiff's complaint in this case is not at issue on appeal. This Court has repeatedly recognized the District Court's authority, under Rule 41b F. R. Civ. P. as well as its inherent power, to dismiss a complaint to prevent undue delay, docket congestion and the possible harassment of defendants. *Medeiros* v. *United States*, 621 F.2d 468 (1st Cir. 1980); *Asociacion de Empleados* v. *Morales*, 538 F.2d 915 (1st Cir. 1976); *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 629-30 (1962).

What is at issue is whether the District Court judge abused his discretion in dismissing the complaint. This Court, on appeal, should not disturb that exercise of discretion unless, after placing itself in the position of the trial judge, the Court concludes there was a clear error of judgment in granting the dismissal. *In Re Josephson*, 218 F.2d 174, 182 (1st Cir. 1954); *States Steamship Co.* v. *Philippine Airlines*, 426 F.2d 803, 804 (9th Cir. 1970). There was no such error here because Judge Loughlin's judgment is supported by a pattern of dilatory conduct by plaintiff and prejudice to the defendants.

The starting point in this determination should be a careful review of the circumstances of the case. *Medeiros, supra*, at 470. Even though this Court has never specified what circumstances justify a dismissal, the cases indicate that enough must be known about the case to permit the Court to appraise the conduct and attitude of plaintiff in relation to the progress of the case. *Corchado* v. *Puerto Rico Marine Management, Inc.*, 665 F.2d 410 (1st Cir. 1981); *Medeiros, supra* at 470; *Asociacion de Empleados, supra* at 916-17; *Santiago* v. *Rivera*, 553

F.2d 710 (1st Cir. 1977); *Richman* v. *General Motors Corporation,* 437 F.2d 196 (1st Cir. 1971).

At the outset, it is clear from Judge Loughlin's Orders that he was familiar with this case. His first contact with the case was in May, 1979. Even though the case had been filed eighteen months before he assumed control over it, his first order of June 22, 1979, clearly indicates that he had fully familiarized himself with the case. (Appendix at 379) From that date, he closely monitored it, and periodically reminded counsel of its priority and his concern for further delay. (*See* Appendix at 465)

At the time of dismissal, this case was the second oldest on the district court docket, with three hundred seventeen docket entries. (Appendix at 465) However, the Court need not review the voluminous record to put the District Court's action in context. The principal events leading to dismissal, in chronological order, are the Glasberg withdrawal (Appendix at 444), plaintiff's failure to pursue any discovery after the Glasberg withdrawal (Appendix at 475), plaintiff's failure to attend a scheduled pretrial conference, and the withdrawal of Hirsch. (Appendix at 546) These events took place despite repeated expressions of concern by the District Court about the status of this case. (Appendix at 379; 460; 465; 495; 536; 552)

The Complaint was filed in November, 1977. Initially, Glasberg aggressively sought discovery, submitting multiple requests for documents and interrogatories, filing motions to compel production and to regulate the scope and sequence of discovery. (Appendix, passim). After a stormy three year pretrial period, both parties were fully prepared to start trial on December 29, 1980. However, Glasberg suddenly withdrew on September 24, 1980, citing irreconcilable differences, apparently involving a fee dispute. (See Attorney Lien, Appendix at 451)

Predictably, Glasberg's withdrawal stopped the forward momentum of the case. New local counsel immediately moved

for a continuance on the grounds that he had not had an opportunity to review all of the pleadings and discovery compiled to that date. (Appendix at 455; ¶3 and ¶4) Although plaintiff essentially ignores this sequence of events, it has an important bearing on the dismissal. It justifies the trial judge's prediction that Hirsch's subsequent withdrawal on the eve of trial would trigger a substantial delay similar to the one encountered in 1980.

Hirsch had become trial counsel around the first month of 1981, more than three months after Glasberg's departure. Although he advised the Court and defendants on January 15, 1981 that he would be able to review the Glasberg file by March 16, 1981 and that he anticipated no problems with the representation of plaintiff through the trial of this case, he failed to conduct any discovery from January 20, 1981 to October 5, 1981 when he gave notice of the depositions of three defendants whose depositions had previously been taken. (Appendix at 12, Docket Entry 270; 473) Judge Loughlin was critical of Hirsch's prosecution of the case in his Order of September 11, 1981 when he said:

> "Given the course of the case since Mr. Hirsch's appearance in January 1981 as noted above, the lack of any discovery since my Order of January 20, 1981, and the close proximity of final pretrial on November 20, 1981 and trial date of December 7, 1981, it appears that tight control and strict adherence to the Federal Rules of Civil Procedure must be followed if this case is to be tried on December 7, 1981." (Appendix at 474-75)

The last item in this Order was a scheduled hearing on objections, if any, to plaintiff's request for further discovery. (Appendix at 475) The Court held this hearing on objections on October 9, 1981. Plaintiff's counsel failed to appear, despite adequate notice. Shortly thereafter, the plaintiff moved to continue the third trial date, notwithstanding the Order of October 9, 1981 requiring the case to be tried on December 7, 1981. (Appendix at 12, Docket entries 276, 277; 492)

In response, the District Court entered an Order on November 13, 1981 in which he stated that he felt that the case had moved "another step away from trial" and in which he denied further discovery, and ordered that the case proceed as scheduled without further continuances. (Appendix at 495) Moreover, he explicitly warned that any additional delays would result in dismissal with prejudice. (Appendix at 502) It was only because of Judge Loughlin's illness that the trial date was rescheduled to April 27, 1982, with a final pretrial conference scheduled for April 8.

Hirsch's withdrawal was filed on April 2, 1982. In his Leave to Withdraw as Attorney, Hirsch stated that irreconcilable differences between the plaintiff and him had arisen over legal fees and the conduct of the action. Specifically, Hirsch stated in part:

> "Plaintiff has not been cooperative in providing the undersigned with his financial records and other documents relative to the issue of damages and in introducing the undersigned to certain persons whose testimony on such issues is vital. Further, plaintiff advised the undersigned that an important prospective witness relative to the substantive issues has refused to testify and would not allow the latter to attempt to change the mind of such person." (Appendix at 548, ¶8)

Thus, Hirsch's position was that certain elements of the case had not been prepared for trial because of plaintiff's personal conduct.

These facts presented the District Court with a number of factors justifying dismissal. Even before Hirsch's withdrawal, the failure of plaintiff's counsel to conduct pretrial discovery and to attend a scheduled hearing alone would have justified a dismissal with prejudice. As this Court held in *Corchado:*

> "We hope that we have made it clear by now that a district court's discretion to use the extreme sanction of dismissal for failure of counsel to respond properly to discovery orders or to fail to appear at scheduled conferences or

hearings will be upheld unless abused. (case cites omitted)" *Corchado, supra* at 413.

Accord Link, supra at 634-35.

However, the District Court rested its judgment on at least two additional and important factors. First of all, Hirsch attributed his withdrawal on April 2, 1982 not only to a fee dispute, but also to a lack of cooperation by plaintiff himself. (Appendix at 546) The matter of plaintiff's personal lack of cooperation has never been controverted by plaintiff either in his Motion to Vacate Order of Dismissal (Appendix at 556) or his brief to this Court.[2] Accordingly, this Court can only conclude, as did the District Court, that plaintiff had been deliberately proceeding in a dilatory fashion. Moreover, based on previous events following Glasberg's withdrawal, the Court reasonably calculated that Hirsch's withdrawal would signify yet another delay.

Apart from the plaintiff's dilatory conduct, the District Court's exercise of discretion was justified as a means to protect defendants from harassment. As the District Court noted in its Order of December 30, 1981, plaintiff's proposed depositions, although assertedly necessitated by the omission of plaintiff's previous trial counsel, were actually duplicative and unnecessary. (Appendix at 536) The combination of this conduct and the probability of further delay imposed an unreasonable cost on defendants. (Appendix at 553)

Whether or not Meade was ready to proceed with this case (as he now asserts), the District Court was neither obliged to permit local counsel to proceed nor obliged to wait for the scheduled final pretrial conference in order to let plaintiff explain that he would still go forward with local counsel.

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[2] Both documents deny only the alleged fee dispute. (Brief at 17; Appendix at 558-59) In an Affidavit which accompanied the Motion to Vacate Order of Dismissal, the plaintiff Bernard P. Colokathis stated: "I do not agree with the statements contained in Attorney Hirsch's Motion to Withdraw relative to a fee dispute." (Appendix at 558-59)

Indeed, neither of these alternatives would have been appropriate. The plaintiff had engaged in a pattern of delay, of which the reasonably anticipated delay caused by the Hirsch withdrawal was only the last episode. The Court had already excused the lack of discovery after Glasberg's withdrawal and the failure to attend a scheduled pretrial. In light of plaintiff's conduct, the Court was not required to consider plaintiff's excuses at the pretrial. *See Asociacion, supra* at 917, n. 8.

Furthermore, the lesser sanctions of warning, formal reprimand, placing the case at the bottom of the list, a fine, the imposition of costs or attorneys fees, or the temporary suspension of counsel from practice before the Court were equally inappropriate. *See Santiago* v. *Rivera,* 553 F.2d 710 (1st Cir. 1977) Punishing counsel was simply not a meaningful alternative, particularly in light of the undisputed evidence that plaintiff was not cooperating with trial counsel in the preparation of the case, after five years on the docket and on the eve of the fourth scheduled trial date.

Plaintiff's reliance on *Richman* v. *General Motors Corporation,* 437 F.2d 196 (1st Cir. 1971), is misplaced. In *Richman,* the complaint had been on file for only nineteen months, both parties were actively conducting discovery, the case had made only nominal demand on judicial time and plaintiff had presented an adequate explanation for its Motion to Continue before the case was reached for the first time. In contrast, in the present case the complaint before Judge Loughlin was the second oldest case on the Federal District Court docket, and had involved the labor of two judges and a magistrate for approximately five years in a district whose docket had increased 70% during that time. (Appendix at 552) Additionally, the plaintiff had failed to conduct serious discovery, had missed a pretrial hearing and for the second time had driven experienced trial counsel to withdraw on the eve of the fourth trial date. (Appendix at 553-54)

In short, the circumstances of this case justify the dismissal of plaintiff's complaint with prejudice. The District Court was faced with a clear record of delay by plaintiff culminating in the withdrawal of Attorney Hirsch. Accordingly, the Court did not abuse its discretion ordering dismissal.

II. THE PLAINTIFF HAD NO ABSOLUTE RIGHT TO ADVANCE NOTICE AND A HEARING PRIOR TO THE DISTRICT COURT'S DISMISSAL FOR FAILURE TO PROSECUTE.

The District Court dismissed plaintiff's complaint without notice several days before the scheduled final pretrial. (Appendix at 550; 552) Although plaintiff now argues that he was constitutionally entitled to prior notice and opportunity to explain the withdrawal, recent decisions in this Circuit hold that a dismissal for want of prosecution without notice and hearing is within the sound discretion of the District Court. *Corchado v. Puerto Rico Marine Management, Inc.*, 665 F.2d 410, 413 (1st Cir. 1981). Under the circumstances of this case, dismissal of the complaint without advance notice and hearing was well within the bounds of permissible discretion.

This Court has been guided by the Supreme Court's holding in *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962) in determining what process is due before the sanction of dismissal is imposed. In *Link*, the Supreme Court noting that the absence of notice or hearing does not necessarily render such a dismissal void, held:

> "The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. . . . Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand

> on appeal depends not on power but on whether it was within the permissible range of the court's discretion." *Id.* at 632-33.

Appropriately, no hearing is necessary when the circumstances indicate that plaintiff knew dismissal was a likely consequence of his actions.

This Court must reasonably conclude that the plaintiff himself knew or should have known that Hirsch's eleventh hour withdrawal from this case would precipitate a dismissal. Even a cursory reading of the Court's orders from January 20 to December 30, 1981 reveals the Court's increasing displeasure with plaintiff's prosecution of the case. Specifically, the Court chided plaintiff's lack of *any* discovery during the first eight months following Hirsch's appearance (Appendix at 475), criticized the delays in locating local counsel and finally initiating renewed discovery, and justifiably took plaintiff to task for failure to appear at the pretrial hearing scheduled on October 9. (Appendix at 502)

In addition, the District Court had given fair warning that drastic sanctions would accompany any more delays in the case, including the November 13, 1981 Order which explicitly stated:

> "To avoid any possibility of misconstruction of this Court's ruling we will be as laconic as possible: all further discovery is denied; all further continuances, absent the most exigent of circumstances, are denied; plaintiff's motion to withdraw the order of October 9 as to further discovery is denied; this case will proceed to trial as presently scheduled, or it will be dismissed with prejudice." Appendix at 502.

A similar warning was given great weight by this Court in *Asociacion.* There the District Court had informed plaintiff that "such failure [to file a reply or brief in opposition to defendant's Motion to Dismiss] can well be construed by the Court as a lack of interest in the prosecution of this case". *Id.* at 916, n. 3; 917.

Finally, the plaintiff must have known that Hirsch had provided the Court with sufficient reason to dismiss the case

without notice and hearing solely by predicating his withdrawal on plaintiff's personal failure to cooperate in preparing for trial. (Appendix at 548, ¶8). As discussed, Hirsch indicated that consequently, elements of the case were still not prepared for trial. Also, as noted previously, the plaintiff has never denied failing to cooperate with Hirsch. Moreover, Hirsch certainly did not need an opportunity to further explain his withdrawal.

In summary, plaintiff cannot reasonably claim that he did not have notice of the seriousness with which the Court viewed the plaintiff's previous conduct in the case and of the probability of dismissal in the event such conduct were repeated. In accordance with the rule in *Link*, the District Court's dismissal without providing plaintiff or his counsel advance notice and hearing was within the bounds of permissible discretion.

III. THE DISMISSAL IMPOSED NO UNJUST PENALTY ON THE PLAINTIFF BECAUSE PLAINTIFF MUST BEAR PERSONAL RESPONSIBILITY FOR THE SUCCESSIVE WITHDRAWALS AND CONDUCT OF HIS MANY ATTORNEYS.

Contrary to plaintiff's contentions, dismissal of this case does not punish him simply for his attorney's conduct. Even if it did, however, this Circuit recognizes the principle that each party is deemed bound by the acts of his lawyer agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney". *Smith* v. *Ayer*, 101 U.S. 320, 326 (1880); *Corchado, supra.; Pease* v. *Peters*, 550 F.2d 698 (1st Cir. 1977). Consequently, plaintiff in this case is charged with notice of the Court's Orders prior to dismissal and bound by the conduct of counsel, including Hirsch's last minute withdrawal.

The Supreme Court held a client bound to his attorney's inaction in *Link* v. *Wabash Railroad Co.*, 370 U.S. 626 (1962). There the Court held:

> "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client." *Id.* at 633.

Even though this rule in some cases may visit the sins of counsel on plaintiff himself, this Court has deemed that penalty to be "an unavoidable side effect of the adversary system." *Corchado, supra* at 413.

As the record demonstrates, the plaintiff in this case is not doing penance simply for the acts of an attorney. The undisputed facts are that plaintiff had as many as nine (9) lawyers (Glasberg, Blanchard, Saunders, Catalfo, Bailey, Wolff, DePuy, Hirsch and Meade) work on this case at one time or another, and that shortly before the second trial date his experienced trial counsel of three years withdrew citing irreconcilable differences. Then, days before the fourth trial date, Hirsch withdrew citing once again irreconcilable differences, including the plaintiff's personal lack of cooperation.

Under these circumstances, dismissal without notice did not impose an unjust penalty on plaintiff. *See Forteza e Hijos* v. *Mills,* 534 F.2d 415, 418 (1976).

CONCLUSION

For the reasons stated, the defendants, Wentworth-Douglass Hospital, John L. Beckwith, William Cuseck, Jr., Roger C. Temple, H. Jack Myers, and John Neff, urge that this Court affirm the order and judgment of the District Court.

Respectfully submitted,

WENTWORTH-DOUGLASS HOSPITAL,
JOHN L. BECKWITH, WILLIAM
CUSECK, JR., ROGER C. TEMPLE,
H. JACK MYERS, AND JOHN NEFF
By SULLOWAY HOLLIS & SODEN

Dated: July 23, 1982

By _____
Robert M. Larsen
Of Counsel:

Eugene Van Loan, III, Esq.
A.J. McDonough, Esq.

CERTIFICATE

I certify that a copy of the within Brief has been delivered to Charles A. Meade, Esq., counsel for the Appellant.

By _____
Robert M. Larsen

Dated: July 23, 1982